Supreme Court, U.S.
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931432 MAR - 8 1994
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No. _____

IN THE
Supreme Court of the United States
October Term, 1993

SAMUEL D. ADAMO and TANA ADAMO
Petitioners,
v.
STATE FARM LLOYDS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS, HOUSTON, TEXAS

PETITION FOR WRIT OF CERTIORARI

HAGANS & ASSOCIATES

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53 pp

QUESTION PRESENTED

1. Whether due process, as guaranteed through the Fifth and Fourteenth Amendments of the United States Constitution, requires an opportunity for oral argument before the trial court on a summary judgment motion when properly and timely requested by the party against whom summary judgment is subsequently rendered.

LIST OF PARTIES

Samuel D. Adamo and Tana Adamo (petitioners here and appellants below).

State Farm Lloyds Company (respondent here and appellee below).

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL D. ADAMO and TANA ADAMO,
Petitioners,
v.
STATE FARM LLOYDS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS, HOUSTON, TEXAS

PETITION FOR WRIT OF CERTIORARI

Petitioners Samuel D. Adamo and Tana Adamo request that this Court issue a writ of certiorari to review the judgment and opinion of the Texas Fourteenth Court of Appeals, Houston, Texas, entered in this proceeding on April 1, 1993; for which rehearing was overruled by that Court on April 29, 1993; for which application for writ of error to the Texas Supreme Court was denied on November 3, 1993; and for which rehearing was overruled by that Court on December 8, 1993.

OPINIONS BELOW

The opinion for which review is requested is *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673 (Tex. App.--Houston [14th Dist.], *writ denied*, 864 S.W.2d 491 (Tex. 1993)), and is reprinted in the Appendix, along with the orders overruling Petitioners' motions for rehearing in both the Texas Fourteenth Court of Appeals and the Texas Supreme Court. Sup. Ct. R. 14.1. The trial court's orders

granting summary judgment and denying Petitioners' motion for rehearing are also reproduced in the Appendix. *Id.*

JURISDICTION

The judgment of the Texas Fourteenth Court of Appeals, Houston, Texas, was rendered on April 1, 1993. Petitioners' timely motion for rehearing was overruled on April 29, 1993. Petitioners' application for writ of error to the Texas Supreme Court was denied on November 3, 1993. Petitioners' timely motion for rehearing was overruled on December 8, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES

Petitioners' petition for writ of certiorari involves the application and interpretation of a Texas statute and two Texas Rules of Procedure: Texas Government Code § 74.053; Texas Rule of Civil Procedure 166a(c); and Harris County District Court Rule 3.3.4.. The pertinent text of these is set out in the Appendix. Sup. Ct. R. 14.1(f), (k).

STATEMENT OF THE CASE

> **"Mail order justice--the kind that comes with a stamp but no opportunity to be heard . . . a judge has a duty to be more than a correspondent and a litigant has a right to more than a postcard announcing defeat."**

Adamo v. State Farm Lloyds Co., 864 S.W.2d 491 (Tex. 1993) (Doggett, J., dissenting).

This case presents a narrow constitutional issue requiring a single definitive answer that only this Court can give: whether a trial court can render a summary judgment against a party without ever allowing an oral hearing, despite two separate proper and timely requests. The Texas Fourteenth Court of Appeals approved this practice and, with the exception of the Supreme Court Justice quoted above, the Texas Supreme Court refused to consider the issue.

The facts relevant to this petition are relatively simple. Samuel and Tana Adamo were insured by State Farm. Samuel is an attorney, and his wife, Tana, is a full-time homemaker. They were both individually named in a law suit brought by a long-time personal friend of theirs, Joseph Marino, who had recently become one of Samuel's clients.

State Farm filed a separate law suit in State court against Samuel and Tana Adamo, claiming that it had no duty to defend the Marino law suit. State Farm then filed a motion for summary judgment. The Adamos timely filed their response to the motion and also timely filed a written request for an oral hearing. Without ruling on the request for an oral hearing, the trial court granted State Farm's motion for summary judgment. The Adamos timely filed a motion for new trial and again timely filed a request for an oral hearing. Again, without ruling on the request for an oral hearing, the trial court denied the motion for new trial.

Unbeknownst to the Adamos, an assigned judge had granted State Farm's motion for summary judgment. Under the Texas Government Code § 74.053, if a party files a timely objection to the assignment of a judge, the judge is automatically disqualified from hearing the case. Consequently, the Adamos had the absolute right to object to having an assigned judge rule on the summary judgment motion. It was, of course, impossible for the Adamos to

exercise this separate statutory right because they were not given any notice that an assigned judge was going to decide the motion. A party is deprived of this right when they are denied access to the courtroom to see that someone other than the duly elected judge of that court is going to decide the case.

The first and only oral argument in this case occurred on appeal before the Texas Fourteenth Court of Appeals. Ironically, in Texas, a party is entitled to oral argument at the appellate level, yet according to the court of appeals a party is not entitled to oral argument at the trial court level. Within the parameters of due process, oral argument on appeal is too late--not a meaningful time. Consequently, once this Court determines that due process applies, the question remains what process is due. As applied to the present case, the question is whether the Adamos were entitled to an oral hearing at the trial court level before they were deprived of their property interests.

REASONS FOR GRANTING THE WRIT

1. TO DATE, THIS COURT HAS DECLINED TO ADDRESS THE QUESTION OF WHETHER DUE PROCESS REQUIRES AN OPPORTUNITY FOR BOTH WRITTEN SUBMISSION AND ORAL ARGUMENT ON A SUMMARY JUDGMENT MOTION IN A JUDICIAL PROCEEDING.

Once it is determined that due process applies, the question remains what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 484 (1972). The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be "at a meaningful time and in a meaningful

manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 62 (1965). The open question is whether the opportunity to be heard includes the opportunity for oral argument. FRIENDLY, SOME KIND OF HEARING, 123 U. Pa. L. Rev. 1267, 1281 (1972).

Generally, this Court has been protective of a party's right to oral argument, particularly before a party's property rights are determined. Due process of law requires that a party have the right to support his allegations by argument, however brief. *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908). The presentation of argument enables the opposing party to know the claims and to meet them; without which, the right is a barren one. *Morgan v. United States*, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776, (82 L.Ed. 1129 (1938) (*Morgan II*). In *Morgan II*, there was no question that a full hearing includes the right to present oral testimony and argument. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 256 n.8, 93 S.Ct. 810, 826 n.8, 35 L.Ed.2d 223 (1973) (Douglas, J., dissenting).

Twenty-four years ago, this Court addressed the right to present oral argument to the trial court in an administrative proceeding. In *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970), the recipient of welfare benefits was allowed to state his position orally. However, this Court expressly declined to address the question of whether due process requires only an opportunity for written submission, or an opportunity for both written submission and oral argument. *Id.* at n.15. Likewise, in *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949), the issue concerned the extent to which due process requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action. This Court held that when

and under what circumstances procedural due process may require oral argument is a matter for case-to-case determination, taking into account the particular interests affected and circumstances involved. *Id.* at 277.

While this Court has arguably addressed the issue in the administrative context, it has not addressed it in the judicial context. Of course, procedural due process in the administrative setting is far more limited or narrow than procedural due process in the judicial model. *See Dixon v. Love*, 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172 (1977).

In the present case, the Texas court has sanctioned a procedure that is at odds with the minimum procedural requirements of federal due process. This it cannot do. Minimum procedural requirements are a matter of federal law; they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate. *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980).

2. THE FEDERAL COURTS OF APPEAL HAVE BEEN IN CONFLICT FOR ALMOST THIRTY YEARS CONCERNING WHETHER AN ORAL HEARING IS REQUIRED ON A MOTION FOR SUMMARY JUDGMENT.

While due process does not generally include the right to oral argument on a non-dispositive motion, there is a division of authority in the federal circuits concerning whether a motion for summary judgment may be granted without affording oral argument. 6 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.14[1] at 56-191 (2d ed. 1993); *see also Spark v. Catholic University of Am.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (per curiam).

The controversy among the federal circuits is whether an oral hearing is required or if the summary judgment motion can be decided on written submission alone. 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720.1 at 36 (1983). It has been held that a motion for summary judgment may be considered without oral argument unless one of the parties specifically requests an oral hearing. *Id.* at 38. The division in the federal circuits can largely be reconciled by determining if the party desiring an oral hearing timely requested one. In the present case, Petitioners specifically and timely requested an oral hearing, not once but twice.

In *Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964), the Ninth Circuit held that a trial court may not deny a request for oral argument when made by a party opposing a motion for summary judgment, unless the court denies the motion for summary judgment. Subsequently, the Ninth Circuit held that without a timely request for oral argument, the right will be waived. *Fernhoff v. Tahoe Regional Planning Agency*, 803 F.2d 979, 982-83 (9th Cir. 1986).

Even the Eighth Circuit, which purports to disagree with the holding of *Dredge Corp v. Penny*, approved of the denial of an oral hearing by citing the failure of the complaining party to make a proper request. *See Parish v. Howard*, 459 F.2d 616, 619-20 (8th Cir. 1972) (neither party made a proper request).

Other opinions have relied solely on the failure to make a timely request. *See, e.g., Deutsch v. Burlington Northern R.R. Co.*, 983 F.2d 741, 744 n.2 (7th Cir. 1992), *cert. denied*,113 S. Ct. 1845 (1993) (opposing party failed to request); *Yamaha Corp. of Am. v. Stonecipher's Baldwin Pianos & Organs, Inc.*, 975 F.2d 300 (6th Cir. 1992)(no

request); *Clark Equip. Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 580 (8th Cir. 1984) (per curiam)(no request until after motion granted); *Shearer v. Homestake Mining Co.*, 727 F.2d 707, 709 (8th Cir. 1984) (no request until after motion granted); *United States v. One 1974 Porsche 911-S Vehicle*, 682 F.2d 283, 286 n.4 (1st Cir. 1982) (no request); *McMillian v. City of Rockmart*, 653 F.2d 907, 911 (5th Cir. 1981)(no request); *Anderson v. Viking Pump Division, Houdaille Indus., Inc.*, 545 F.2d 1127 (8th Cir. 1976)(per curiam)(no request); *Allen v. Beneficial Fin. Co. of Gary, Inc.*, 531 F.2d 797, 800 (7th Cir.), *cert. denied*, 488 U.S. 927 (1988) (no request); *Benson v. Matthews*, 554 F.2d 860, 862 (8th Cir. 1977)(per curiam)(no request); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 391 (6th Cir. 1975)(no request).

Several opinions which apparently allow the denial of oral argument simply do not state whether or not a request was ever made. *See, e.g., Geear v. Boulder Community Hosp.*, 844 F.2d 764, 765 (10th Cir.), *cert. denied*, 488 U.S. 927 (1988) ; *Helmich v. Kennedy*, 796 F.2d 1441 (11th Cir. 1986)(per curiam); *Grigoleit Co. v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 270*, 769 F.2d 434 (7th Cir. 1985); *Hamman v. Southwestern Gas Pipeline, Inc.*, 721 F.2d 140 (5th Cir. 1983); *Moore v. State of Florida*, 703 F.2d 516 (11th Cir. 1983)(presumably no request since no response was filed to the motion for summary judgment); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854 (5th Cir. 1983).

Specifically regarding the Fifth Circuit, the issue cries out for clarification. The Fifth Circuit has continually erred in the citation of its earlier opinion in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970). In that case, oral argument was in fact conducted on the motion for summary judgment. The court held that it was not error to refuse oral

argument on the motion for reconsideration of the earlier-argued summary judgment motion. *Bon Air Hotel, Inc.* 426 F.2d at 862. Subsequently, in *Kibort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976), the court cited *Bon Air Hotel, Inc.* for the proposition that an oral hearing is not required on a summary judgment motion. From the specific language of the *Bon Air Hotel, Inc.* opinion, this reading is wrong. It has, nonetheless, survived and continues to be misread in later cases. *See, e.g., Barker v. Norman*, 651 F.2d 1107, 1119 (5th Cir. 1981)("we held in *Kibort* . . . the 'hearing' need not be one in which the court receives oral argument").

The United States courts of appeal have rendered decisions conflicting with the decisions of their sister courts. The Fifth Circuit has rendered decisions conflicting with its own decisions. The Texas Fourteenth Court of Appeals has rendered a decision deciding an important question of federal law which has not been, but should be, addressed by this Court.

Finally, the Texas Fourteenth Court of Appeals stated in its opinion that Petitioners must show specific harm from the denial of oral argument. In other words, the court imposed the requirement that Petitioners show something beyond the manifest injustice of denying a litigant a fundamental procedural due process right. Without belaboring the point, Petitioners assert that they were denied their separate statutory right to disqualify the assigned judge who granted the summary judgment motion. As explained above, this denial occurred when the trial court failed to conduct an oral hearing on the motion for summary judgment. Consequently, Petitioners received first notice of the assignment when they received a copy of the judgment already rendered against them.

Beyond that, no party deprived of this right can know what effect oral argument might have had upon the trial court, or what new arguments and emphases might have emerged from the colloquy between court and counsel. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280 (9th Cir. 1981)("we will not ask appellant to produce a crystal ball"). In that regard, it is significant that the trial court merely granted the motion without any opinion detailing its decision. Consequently, there is no tangible proof of a trial court's struggle with a close and critical question to establish specific prejudice. *Id.*

CONCLUSION

Oral argument best serves the interests of justice. In this age of crowded dockets, we must be mindful that speech may succeed when the printed word has failed. Great lawyers are "masters of the word, both spoken and written." WILKIN, THE SPIRIT OF THE LEGAL PROFESSION 22 (1938).

Oral argument establishes a human connection between bench and bar. It is counsel's opportunity "to involve the interest of the judge, to make him a participant, if you will, in the hunt for the just and fair result and not merely an arbiter, aloof and detached." POLLACK, THE CIVIL APPEAL, COUNSEL ON APPEAL 45 (A. Charpentier ed. 1968). Oral argument enables judges to test their thinking with counsel available to suggest illumination or refinement of critical issues.

Oral argument is the advocate's last clear chance to prevail. A dialogue between judge and lawyer indulges a reasonable procedure to help ensure the just and proper consideration and disposition of the case. Whether this is a fundamental due process right is a question for which only this Court can give a satisfactory answer. Petitioners Samuel D. Adamo and Tana Adamo respectfully request that this Court grant their petition for writ of certiorari to review the judgment and opinion of the Texas Fourteenth Court of Appeals, Houston, Texas.

Respectfully submitted,

HAGANS & ASSOCIATES

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Attorney for Petitioners,
Samuel D. Adamo and Tana Adamo

APPENDIX A

THE SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 8, 1993

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Houston, TX 77056

RE: Case No. D-3835

Style: SAMUEL D. ADAMO and TANA ADAMO v. STATE FARM LLOYDS COMPANY

Dear Counsel:

Motion for rehearing of application for writ of error in the above referenced case was this day overruled.

Sincerely,

John T. Adams, Clerk

by /s/ illegible
Courtland Crocker
Deputy

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 3, 1993

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RE: Case No. D-3835

Style: SAMUEL D. ADAMO and TANA ADAMO
v. STATE FARM LLOYDS COMPANY
No. 91-52324 in the 55th District Court, Harris County
No. B14-92-00650-CV in the Fourteenth Court of Appeals

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied." Enclosed is the Dissenting Opinion to Denial of Application for Writ of Error by Justice Doggett.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/ Peggy Littlefield
Peggy Littlefield,
Chief Deputy Clerk

cc: Ms. Katherine Tyra
Honorable Joe L. Draughn
Hon. Putnam Kaye Reiter

APPENDIX C

Samuel D. ADAMO and Tana Adamo, Appellants,
v.
STATE FARM LLOYDS COMPANY, Appellee.

No. B14-92-00650-CV

Court of Appeals of Texas
Houston (14th Dist.).

April 1, 1993..

Rehearing Denied April 29, 1993.

Homeowners' insurer filed declaratory judgment action and motion for summary judgment, alleging that there was no duty to defend legal malpractice action. The 55th District Court, Harris County, P.K. Reiter, J., entered summary judgment in favor of insurer, and insureds appealed. The Court of Appeals, Draughn, J., held that: (1) lawsuit did not fall within homeowners' coverage simply because client and insureds were friends, and (2) trial court's denial of insureds' request for oral hearing on summary judgment motion was not reversible error.

Affirmed.

1. Appeal and Error 863, 934(1)

When reviewing grant of summary judgment, Court of Appeals must determine whether movant carried its burden

to show that no genuine issue of material fact existed, accept evidence favorable to non-movant as true, and indulge every reasonable inference in non-movant's favor.

2. Appeal and Error 934(1)

If motion for summary judgment is based on facts alleged in petition, Court of Appeals must accept as true every allegation against which motion is directed.

3. Insurance 514.21(1)

Insurer has burden to prove that allegations contained in underlying plaintiff's petition are excluded from coverage and therefore, insurer has no duty to defend; any doubt as to whether insurer has duty to defend is resolved in insured's favor.

4. Insurance 514.9(1)

If case is potentially within policy coverage, insurer has duty to defend.

5. Insurance 514.10(2)

Legal malpractice action did not fall within homeowners' policy simply because client's petition alleged that fiduciary relationship existed between parties as result of long-time personal relationship and therefore, insurer had no duty to defend; primary thrust of petition was that client had been harmed by virtue of his dealings with attorney who represented him and handled his personal and business dealings while he was out of the country and fact that client and attorney were friends was incidental to facts giving rise to lawsuit.

6. Insurance 514.10(2)

Client's lawsuit against attorney and his wife did not fall within homeowners' policy simply because client's petition alleged that fiduciary relationship existed between parties as result of long-time personal relationship and therefore, insurer had no duty to defend; allegations against attorney's wife could be traced back to professional relationship of attorney and client and allegation of violation of fiduciary duties against her derived from this relationship.

7. Insurance 514.10(1)

It is not cause of action alleged which determines coverage and whether insurer has duty to defend, but facts giving rise to alleged actionable conduct.

8. Insurance 514.9(1)

When legal malpractice is claimed, mere existence of friendship between attorney and client does not automatically implicate duty to defend attorney by insurance carrier under some other broad, nonmalpractice insurance, such as homeowner's policy; if friendship were triggering factor, attorney could forego malpractice insurance and plead friendship to obtain his carrier's defense under homeowner's policy.

9. Insurance 514.10(1)

If petition alleges facts that, prima facie, exclude insured from coverage, insurer has no duty to defend.

10. Insurance 146.5(4)

In determining applicability of exclusion in insurance policy, Court of Appeals must focus on origin of damages and not legal theories asserted for recovery.

11. Appeal and Error 1073(1)

Trial court's denial of insureds' request for oral hearing on insurer's motion for summary judgment was not reversible error; trial judge had all relevant evidence from both parties before him and even conceding potentially persuasive skills of insureds' attorney in summary judgment hearing, there was no evidence that insureds were harmed by trial court's refusal to hold hearing.

12. Judgment 186

Decision whether to grant oral hearing on summary judgment motion is purely within discretion of trail judge.

13. Judgment 186

Unless trial judge requires it, oral argument is not always necessary or desirable in summary judgment proceedings because no new evidence may be received and oral testimony may not be considered.

14. Judgment 156

Oral hearing on summary judgment is little more than argument of counsel since trial court may only determine merits of summary judgment action based upon pleadings, discovery responses, sworn affidavits and other valid evidence. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

15. Appeal and Error 1073(1)
Judgment 186

Even if oral argument on summary judgment motion might be interesting and helpful, Court of Appeals cannot mandate that trial courts must hear it and certainly cannot say that trial court acted so arbitrarily in denying oral hearing on motion as to amount to clear and prejudicial error of law.

William Fred Hagans, Pat Tulinski, Houston, for appellants.

Barry G. Flynn, Paul A. Hoefker, Mark W. Thayer, Houston, for appellee.

Before SEARS, DRAUGHN and BOWERS, JJ.

OPINION

DRAUGHN, Justice.

This is an appeal from the granting of a summary judgment in a declaratory judgment action. Appellants claimed that appellee had a duty to defend them in a separate lawsuit filed against them by Joseph Marino. Appellee filed a declaratory judgment action and a motion for summary judgment, alleging that no duty to defend existed because the appellants' insurance policy did not cover the causes of action asserted against them by Marino. The trial court granted the summary judgment on those grounds. Appellants filed a motion for new trial which was denied. Oral hearings were requested by appellants on both the summary judgment and new trial motions. Both requests were denied. In three points of error, appellants attack the granting of the summary

judgment of substantive grounds, as well as on the basis that they were denied their procedural right to an oral hearing on the summary judgment motion. We affirm the judgment of the trial court.

Appellants are insured by a broad form homeowner's policy which they obtained from appellee. This policy provides that appellee "shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even is any of the allegations of the suit are groundless, false or fraudulent ...." The policy also contained certain liability exclusions. Specifically relevant to this lawsuit were the policy provisions excluding coverage for ... "business pursuits, the rendering of professional services, bodily injury or property damage caused intentionally by the insured, liability assumed by the insured through contract, and damage to property in the care, custody or control of the insured."

Appellant Sam Adamo("Adamo") is a partner in the law firm of Adamo & Cornelius. Joseph Marino ("Marino") sued appellants Sam and Tana Adamo, along with Adamo's partner R.P. Cornelius, the law firm itself, Gene Michael Rebescher, and World Fibers, Inc. In his petition, Marino asserted several causes of action against appellants, including: legal malpractice; breach of contract; negligent infliction of mental anguish; breach of fiduciary duty; fraud and conspiracy to defraud; and conversion.

The factual scenario giving rise to Marino's claims is of ultimate importance in determining whether the trial court properly concluded that appellee had no duty to defend appellants in the Marino lawsuit. Marino claimed that when, in January 1989, he was subpoenaed to appear before a federal grand jury to provide his fingerprints, he turned for

advice to his long-time friend and lawyer, Sam Adamo. Marino asserted that Sam advised him to leave the country until the criminal matter was resolved. Marino and Adamo then made arrangements for the transfer of Marino's personal property and the management of his business, World Fibers, Inc., to Sam's friend, Gene Rebescher ("Rebescher"), while Sam and his partner, R.P. Cornelius, attempted to resolve the criminal matter. After this was accomplished, Adamo made provisions for Marino to travel and reside in Colombia until the federal investigation was over.

Marino alleged in his petition that upon his return to the United States, he found that all of his personal property, including his home and several automobiles, had been sold. He also discovered that his twenty-five year old business had been reincorporated under a different name, and Rebescher refused to relinquish control. Marino asserted in his petition that Sam Adamo and Rebescher were, in all respects, aided by Tana Adamo (Tana) and Cornelius.

After receiving notice of Marino's lawsuit against them, appellants contacted the appellee insurance company and claimed that appellee had a duty to defend them under their homeowner's policy. Appellants asserted that the policy provided coverage for personal injury and property damage, and entitled them to a defense, even if Marino's claims were groundless. Appellee responded with a reservation of rights letter, and informed appellants that it would pay for an attorney of appellants' choice until such time as the duty to defend was determined by a court of law. Appellee noted that such a conflict of interests existed between it and the Adamos that appellants should choose their own attorney, as opposed to using one provided by appellee. Appellee ultimately determined that no duty to defend existed because the facts giving rise to the Marino lawsuit fell within certain exclusions of appellants' policy.

Seeking legal affirmation of its conclusion, appellee filed a declaratory judgment action and motion for summary judgment against appellants. Appellants responded, and after denying appellants' request for oral hearing on the summary judgment motion, the trial court granted appellee's summary judgment. Appellants' motion for new trial and request for oral hearing on the motion for new trial were also denied.

In point of error one, appellants launch a substantive attack on the trial court's granting of appellee's motion for summary judgment. Appellants contend the summary judgment was improper because appellee failed to prove as a matter of law that it had no duty to defend appellants in the Marino lawsuit.

[1,2] When reviewing an appeal from the granting of a summary judgment, we must; (1) determine whether the movant carried its burden to show that no genuine issue of material fact existed; (2) accept the evidence favorable to the non-movant as true, and; (3) indulge every reasonable inference in the non-movant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985); *Dieter v. Baker Serv. Tools, A Div. of Baker Int'l, Inc.*, 776 S.W.2d 781, 783 (Tex.App.— Corpus Christi 1989, writ denied). If, as in the present case, the motion for summary judgment is based on the facts alleged in the petition, we must accept as true every allegation against which the motion is directed. *Abbott v. City of Kaufman*, 717 S.W.2d 927, 929 (Tex.App.— Tyler 1986, writ dism'd); *Gottlieb v. Hofheinz*, 523 S.W.2d 7, 10 (Tex.App.— Houston [1st Dist.] 1975, writ dism'd).

[3] Appellants claim that a fact issue existed with regard to whether appellee had a duty to defend. In Texas, an insurer has the burden to prove that the allegations contained in the underlying plaintiff's petition are excluded

from coverage. *Evans v. General Ins. Co.*, 390 S.W.2d 818, 821-22 (Tex.Civ.App.— Dallas 1965, no writ). Any doubt is resolved in the insured's favor. *See Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex.1987).

[4] While appellants concede that the legal malpractice claims would not be covered by the homeowner's policy, they argue that appellee has a duty to defend the entire suit if a duty to defend exists with regard to any aspect of the case. *See Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*,387 S.W.2d 22, 26 (Tex.1965). If a case is *potentially* within the policy coverage, the insurer has a duty to defend. *Mary Kay Cosmetics, Inc. v. North River Ins. Co.*, 739 S.W.2d 608, 612 (Tex.App.—Dallas 1987, no writ) (emphasis added),

[5,6] Appellants assert that the Marino lawsuit potentially falls within the policy coverage because Marino's petition alleged that a fiduciary relationship existed between the parties as the result of a longtime *personal* relationship. Hence, appellants argue that such allegations give rise to an ambiguity in the petition as to whether the causes of action arise out of a professional relationship, which would be excluded from coverage, or a personal relationship, which might potentially be covered, giving rise to a duty to defend. At the very least, appellants claim that Tana Adamo is entitled to a defense because she is not a lawyer, and all her dealings with Marino arise out of a personal friendship with him. We find appellants' argument creative, but without merit.

[7-10] The focus of appellants' argument is misplaced. IT is not the cause of action alleged which determines coverage but the *facts* giving rise to the alleged actionable conduct. The primary thrust of Marino's petition was that he had been harmed by virtue of his dealings with

Sam Adamo and the other defendants in their capacity of representing him and handling his personal and business dealings while he was out of the country. But for Adamo's advice that Marino leave the United States, the property would not have been transferred to Rebescher. But for the fact that Adamo and Cornelius were lawyers, Marino would not have turned to them for help in the criminal matter. But for their counsel as *attorneys*, Marino would not have relied upon their suggestions on how to administer his affairs while he was gone, nor would Tana have been sued for conduct resulting from her husband's actions as Marino's attorney. The fact that Marino and the Adamos were friends is incidental to the facts giving rise to this lawsuit. When legal malpractice is claimed, the mere existence of a friendship between the attorney and client does not automatically implicate a duty to defend the attorney by the insurance carrier under some other broad, non-malpractice insurance, such as a homeowner's policy. If friendship were a triggering factor, an attorney could forego malpractice insurance and plead friendship to obtain his carrier's defense under his homeowner's policy. If a petition alleges facts that, *prima facie*, exclude the insured from coverage, the insurer has no duty to defend. *Holmes v. Employers Casualty Company*, 699 S.W.2d 339, 340 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Marino's petition did just that by alleging a cause of action which arose only because of the professional attorney-client relationship. The origin of all the damages alleged by Marino stems from this professional relationship between him and Adamo. And in determining the applicability of an exclusion, we must focus on the origin of the damages and not the legal theories asserted for recovery. *Continental Casualty Co. v. Hall*, 761 S.W.2d 54, 56 (Tex.App.—Houston [14th Dist.] 1988, writ denied).

As for all the allegations against Tana, they can be traced back to the professional relationship of Adamo and Marino. The allegation of a violation of fiduciary duties against her derives from this relationship. And a careful review of the allegations reflects that the fiduciary duty allegation would also fall under the other exclusions in whole or in part pertaining to intentional acts, business pursuits, liability under agreements and damage to property in the care, custody, and control of the insured. Point of error one is overruled.

[11] In points of error two and three, appellants claim that the trial court committed reversible error when it granted appellee's motion for summary judgment without allowing an oral hearing on the motion. Appellants further contend that the trial court's denial of their request for an oral hearing violated their federal and state constitutional rights to procedural due process and open courts. We disagree.

[12-15] Appellants did properly request an oral hearing on the motion for summary judgment. In any event, the decision whether to grant an oral hearing on a summary judgment motion is purely within the discretion of the trial judge. Unless the judge requires it, oral argument is not always necessary or desirable in summary judgment proceedings because no new evidence may be received, and oral testimony may not be considered. *Richards v. Allen*, 402 S.W.2d 158, 160 (Tex.1966). The trial court may only determine the merits of the summary judgment action based upon the pleadings, discovery responses, sworn affidavits, and other valid evidence submitted as grounds for the granting or denial of the motion. Tex.R.Civ.P. 166a(c); *Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex.App.—Houston [14th Dist.] 1991, no writ). Hence, an oral hearing on summary judgment is little more than argument of counsel.

Gordon v. Ward, 822 S.W.2d 90, 92 (Tex.App.— Houston [1st Dist.] 1991, writ denied). As such, we find no reversible error in the denial of appellants' request for oral hearing on the motion. The trial judge had all the relevant evidence from both parties before him, including Marino's petition and the insurance policy in question. It was entirely within the trial court's discretion to allow or dispense with oral argument. Even if oral argument might have been interesting and helpful, we cannot mandate that trial courts must hear it. We certainly cannot say that the trial court acted so arbitrarily as to amount to a clear and prejudicial error of law. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex.1985). We, as an appellate court, cannot reverse a judgment unless we find that the error, if any, caused the rendition of an improper judgment, or prevented the appellant from making a proper appellate presentation of the case. Tex.R.App.P. 81(b) (Vernon Supp. 1992). Even conceding the potentially persuasive skills of appellant's attorney in a summary judgment hearing, we have been presented with no evidence that appellant has been harmed by the trial court's refusal to hold a hearing. If our analysis is incorrect and the trial court somehow erred in denying appellant's request for oral hearing, such error was clearly harmless, as the court has all the requisite summary judgment evidence before him to decide the matter. Points of error two and three are overruled.

Accordingly, the judgment of the trial court is

AFFIRMED.

ADAMO v. STATE FARM LLOYDS CO.
Cite as 864 S.W.2d 491 (Tex. 1993)

Samuel D. ADAMO and Tana Adamo, Petitioners,

v.

STATE FARM LLOYDS COMPANY, Respondent.

No. D"3835.

Supreme Court of Texas.

Nov. 3, 1993.

Appealed from Houston Court of Appeals, Fourteenth Judicial District, Joe L. Draughn, J. and District Court Number 55, Harris County, P.K. Reiter, J.

William Fred Hagans, Pat Tulinski, Houston, for petitioners,

Barry G. Flynn, Mark W. Thayer, Paul A. Hoefker, Houston, for respondent.

ON APPLICATION FOR WRIT OF ERROR

Application for writ of error denied.

DISSENTING OPINION TO DENIAL OF APPLICATION FOR WRIT OF ERROR

DOGGETT, Justice, dissenting,

Mail order justice—the kind that comes with a stamp but no opportunity to be heard—could and should have been discouraged here by this Court. The trial court had rendered summary judgment terminating an action against an insurance company without ever according the claimant a hearing, despite his proper and timely request for one. Had the judgment been for the claimant because of the insurer's discovery abuse, not only would an oral hearing have been required, *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991, orig. proceeding), but the trial court's detailing of specific factual findings justifying the judgment would have been well advised, *see Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992), and *de novo* review by this Court of every detail of the trial court's order would have been assured. *See Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 174 (Tex. 1993) (Doggett, J., dissenting). *See also Transamerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991).[2] But not even the possibility of a hearing is considered here.

The more harsh the remedy sought, the more important a hearing becomes. Summary judgment is a decidedly harsh remedy. *First National Bank of Libby, Montana v. Rector*, 710 S.W.2d 100,102 (Tex.App.—Austin 1986, writ ref'd n.r.e.); *Rosemont Enterprises, Inc. v. Lummis*, 596 S.W.2d 916, 923 (Tex.App.—Houston [14th] 1980, no writ). Rule 166a, the operative procedural rule,

refers to a hearing not once but six times;[1] it clearly contemplates that a hearing on a motion for summary judgment will occur before the trial court rules on the motion. This provision was correctly analyzed in *Williams v. Carpentier*, 767 S.W.2d 953, 954 (Tex.App.—Beaumont 1989, no writ);

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1. Subsection (c) provides, in relevant part,

> that Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before *the time specified for hearing*. Except on leave of court, the adverse party, not later than seven days prior to *the day of hearing* may file and serve opposing affidavits or other written response. No oral testimony shall be received at *the hearing*. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations. of the parties, and authenticated or certified public records, if any, on file at *the time of the hearing*, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Subsection (d) provides, in relevant part, that

> Discovery products not on file with the clerk may be used as summary judgment evidence if copies ... are filed and served ... (i) at least twenty-one days before *the hearing* if such proofs are to be used to support the summary judgment; or (ii) at least seven days before *the hearing* if such proofs are to be used to oppose the summary judgment.

Tex.R.Civ.P. 166a(c) and (d) (emphasis added).

> [Rule 166a] specifically calls for a hearing. There are specific deadlines imposed around the hearing date .... Without a hearing being held on a specified day, there is uncertainty created concerning notice, the appropriateness and/or timeliness of pleadings and responses. Because summary judgment is a harsh remedy, rule 166a must be strictly construed .... The failure to conduct a hearing on the specified day was error.

Citing no textual basis for its decision, the court of appeals here rejected the call for a hearing in Rule 166a as merely "discretion[ary]." *Adamo v. State Farm Lloyds Company*, 853 S.W.2d 673, 677 (Tex.App.—Houston [14th] 1980). Although that court conceded both the "potentially persuasive skills of appellant's attorney in a summary judgment hearing," and that oral argument might be "interesting and helpful," it nonetheless found that there was no "clear and prejudicial error of law," since neither oral testimony nor other new evidence would be admissible at such a proceeding.

The hearing requirement of Rule 166a is similar to that of Rule 87, Tex.R.Civ.P. Both contain deadlines based on the hearing date; neither allows evidence at the hearing. Yet in contrast to the holding of the court of appeals here, this Court has held that where a movant request a hearing on a motion to transfer venue, it is reversible error not to hold one. *Henderson v. O'Neill*, 797 S.W.2d 905 (Tex. 1990, orig. proceeding) (per curiam).[2] Surely a hearing on

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2. *See also Thordson v. City of Houston*, 815 S.W.2d 550 (Tex 1991)(per curiam) (reversing court of appeals regarding a suit dismissed for want of prosecution and stating "it was not within the discretion of the trial court to fail to hold an oral hearing on the motion to reinstate").

summary judgment, which may result in termination of a claim or defense is no less important than a hearing on whether an action should be continued in another forum.

To deny this litigant his day or, indeed, even his moment in court not only ignores a procedural rule, but also disregards a basic principle of fairness upon which our system is founded. Even if the moving party has made a persuasive claim that judgment should be granted, the time required for a brief, nonevidentiary hearing is more than justified by the value of allowing a party to argue on its behalf and possibly prevent an erroneous judgment. This is certainly to be preferred to the alternative which makes the court of appeals the first forum at which a summary judgment can be argued—an appellate trip that might have been avoided by a brief explanation of counsel to the trial court.

Fortunately, today's refusal to consider this particular case sets no binding legal precedent; it only sends a disturbing signal by finding no error requiring reversal or of importance to the jurisprudence of the state. T.R.A.P. 133(a). I think this is a matter highly important to our jurisprudence, particularly at a time when some urge the expansion of the scope of the summary judgment as a device to whittle dockets while at the same time suggesting that the right to ever lay eyes on a judge is at the judge's discretion. True, our justice system might be more efficient if all motions were handled by mail without talkative lawyers intruding, but it would also be far less just. Because a judge has a duty to be more than a correspondent and a litigant has a right to more than a postcard announcing defeat. I dissent to the Court's decision to deny the application for writ of error.

APPENDIX D

J.CURTISS BROWN
CHIEF JUSTICE
PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

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FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

April 29, 1993

Hon. William Fred Hagans
2700 Texas Commerce Tower
Houston, TX 77002

Hon. Pat Tulinski
2700 Texas Commerce Tower
600 Travis
Houston, TX 77002

Hon. Barry G. Flynn
Flynn & Hoefker
1300 Post Oak Blvd.
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Hon. Paul A. Hoefker
1300 Post Oak Blvd.
Suite 750
Houston, TX 77056

Hon. Mark W. Thayer
Flynn & Hoefker
1300 Post Oak Blvd.
Suite 750
Houston, TX 77056

RE: CASE NO. 14-92-00650-CV
TRIAL COURT CASE NO. 91-52324

STYLE: Adamo, Samuel D. and Adamo, Tana
V: State Farm Lloyds Company

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause. Further, application for writ of error, if any, must be submitted on or before Monday, June 1, 1993.

MARY JANE SMART, CLERK

By /s/ illegible
Chief Deputy

APPENDIX E

NO.

STATE FARM LLOYDS	)	
COMPANY	)	IN THE DISTRICT
	)	COURT OF HARRIS
VS.	)	COUNTY, TEXAS
	)	
SAMUEL D. ADAMO	)	55TH JUDICIAL
AND TANA ADAMO	)	DISTRICT

ORDER DENYING MOTION FOR NEW TRIAL

BE IT REMEMBERED THAT on this 13 day of March, 1992, came on to be considered the Defendants' Motion For New Trial and the Plaintiff's response thereto, and the Court, having considered same, is of the opinion that said Motion should in all things be denied.

It is, ACCORDINGLY, ORDERED that the Defendants' Motion For New Trial is hereby in all things denied.

All relief not expressly granted herein is denied.

Signed this 13 day of March, 1992.

/s/ illegible
JUDGE PRESIDING

APPROVED:

BARRY G. FLYNN & ASSOCIATES, P.C.

BY: /s/ Barry B. Flynn
BARRY G. FLYNN
State Bar No. 07198560
PAUL A. HOEFKER
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1300 Post Oak Blvd., Suite 750
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(713) 840-7474 Telephone No.
(713) 840-0311 Facsimile No.

V6580 PO301

APPENDIX F

NO. 91-52324

STATE FARM LLOYDS COMPANY	)	IN THE DISTRICT
	)	COURT OF HARRIS
VS.	)	COUNTY, TEXAS
	)	
SAMUEL D. ADAMO AND TANA ADAMO	)	55TH JUDICIAL DISTRICT

FINAL
SUMMARY JUDGMENT

BE IT REMEMBERED that on this 29th day of January, 1992 came on to be considered Plaintiff STATE FARM LLOYDS COMPANY's Motion For Summary Judgment, and the Court having considered same, is of the opinion that said Motion should in all things be granted.

IT IS ACCORDINGLY ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion For Summary Judgment is hereby in all things be granted and that Plaintiff STATE FARM LLOYDS COMPANY has no duty to defend SAMUEL D. ADAMO AND TANA ADAMO in Cause No. 91-26776; styled *Joseph Marino vs. Tana Adamo, et al.*, in the 11th Judicial District Court of Harris County, Texas. Costs are charged to Defendants. All relief not *granted* is DENIED.

SIGNED this 29th day of January , 1992.

/s/ illegible
PRESIDING JUDGE

APPROVED BY:

BARRY G. FLYNN & ASSOCIATES, P.C.

BY:

Barry G. Flynn
State Bar No. 07196560
Jeffrey B. Frey
State Bar No. 07449550
1300 Post Oak Blvd., Suite 750
Houston, Texas 77056
(713) 840-7474 Telephone
(713) 840-0311 Facsimile

RECORDERS MEMORANDUM:
This instrument is of poor
quality and not satisfactory
for photographic recordation;
and/or alterations were
present at the time of filming.

V6498 PO472

APPENDIX G

ch. 148, § 2.93, which provided that the section did not authorize an assigned judge to act in a case over which his own court did not have jurisdiction.

Prior Law:

Acts 1927, 40th Leg., p. 228, ch. 156
Acts 1943, 48th Leg., p.25, ch. 22, § 1.
Vernon's Ann.Civ.St. art. 200a, § 5.

Derivation:

Acts 1985, 69th Leg., ch. 480, § 1.
Acts 1985, 69th Leg., ch. 732, § 2.
Acts 1987, 70th Leg., ch. 148, § 2.93(b)(4).
Acts 1987, 70th Leg., ch. 674, § 1.15
Vernon's Ann.Civ.St. art. 200a-1, § 4.012.
V.T.C.A. Government Code, § 74.031.

Library References

Courts 70.
C.J.S. Courts § 168.

§ 74.053. Objection to Assigned Judge

See, also, italicized material following text of this section.

(a) When a judge is assigned under this chapter the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.

(b) If a party to a civil case files a timely objection to the assignment, the judge is disqualified to hear the case.

(c) An objection under this section must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside.

Added by Acts 1987, 70 Leg., ch. 148, § 2.93(a), eff. Sept. 1, 1987.

Amendment by Acts 1987, 70th Leg., ch. 505, § 1

Acts 1987, 70th Leg., ch. 148, § 5.01(c) provides, in part, that the repeal of a statute by this Act does not affect an amendment of the statute by the 70th Legislature, Regular Session, 1987, and the amendment if preserved and given effect as part of the code provision that revised the statute so amended.

Section 1 of Acts 1987, 70th Leg., ch. 505, amends § 4.01(b) of Vernon's Ann.Civ.St. art. 200a-1 [now, this section] without reference to the repeal of said article by Acts 1987, 70th Leg., ch. 148, § 2.93(b)(4) and Acts 1987, 70th Leg., ch. 674, § 2.14. As so amended, 4.013(b) reads:

"If a party to a civil case files a timely objection to the assignment, the judge is disqualified to hear the case. Each party to the case is only entitled to one objection under this subsection for that case."

Historical Note

Section 2 of Acts 1987, 70th Leg., ch. 505 provides:

"This Act applies to assignment of judges as visiting judges under Chapter 74, Government Code, or the Court Administration Act (Article 200a-1, Vernon's Texas Civil Statutes) made on or after the effective date of this Act. An assignment made before the effective date of this Act is covered by the law in effect at the time of the assignment and that law is continued in effect for that purpose.

Derivation:

Acts 1985, 69th Leg., ch. 732, § 2.
Acts 1987, 70th Leg., ch. 148, § 2.93(b)(4).
Vernon's Ann.Civ.St. art. 200a-1, § 4.013.

APPENDIX H

RULE 166a. SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(Added Oct. 12, 1949, eff. March 1, 1950; amended Oct. 1, 1951, eff. March 1, 1952; July 20 1966, eff. Jan. 1, 1967; July 21, 1970, eff. Jan. 1, 1971; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective March 1, 1990.

Change by amendment effective January 1, 1967; Fourth sentence of paragraph (c) was added,

Change by amendment effective January 1, 1971; The first sentence of paragraph (c) has been added, and the words "answers to interrogatories" have been inserted in the fifth sentence of paragraph (c).

Change by amendment effective January 1, 1978; The time requirements in (c) are changed. The third, fourth, and fifth sentences of (c) are new. The last sentence of (e) is new.

Change by amendment effective January 1, 1981; The second sentence adds the words "with notice to opposing counsel," "and any supporting affidavits," and "filed and." Third sentence adds the words, "file and."

Change by amendment effective April 1, 1984; Section (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

APPENDIX I

3.3 Motions

3.3.1 Form. Motions shall be in writing and shall be accompanied by a proposed order granting the relief sought. The proposed order shall be a separate instrument, unless the entire motion, order, signature lines and certificate of service are all on one page.

3.3.2 Submission. Motions shall state a date of submission which shall be at least 10 days from filing, except on leave of court. The motion will be submitted to the court for ruling on that date or later.

3.3.3 Response. Responses shall be in writing, and shall be filed at least two working days before the date of submission, except on leave of court. Failure to file a response may be considered a representation of no opposition.

3.3.4 Oral argument. The motion or response shall include a request for oral argument if a party views it as necessary. The court may grant that request or order oral argument on its own motion. A request for an oral argument is not a response under Rule 3.3.3.

Supreme Court, U.S.
FILED
MAR 31 1994
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No. 93-1432

In The

Supreme Court of the United States

October Term, 1993

SAMUEL D. ADAMO and TANA ADAMO,

Petitioners,

v.

STATE FARM LLOYDS COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Fourteenth Court Of Appeals
Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether due process, as guaranteed through the Fifth and Fourteenth Amendments of the United States Constitution, requires an oral hearing before the trial court on a summary judgment motion when properly and timely requested by the party against whom summary judgment is subsequently rendered.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State Farm Lloyds Company ("State Farm") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Samuel D. Adamo and Tana Adamo because the Texas Fourteenth Court of Appeals, Houston, Texas, correctly followed Texas law in affirming the trial court's decision to deny the Adamos an oral hearing on their Motion for Summary Judgment.

JURISDICTION

Respondent respectfully disagrees with Petitioners' statement of jurisdiction under 28 U.S.C. §1257(a). The

decision on which the Petitioners seek review is not a final judgment or decree from the Texas Supreme Court as required by §1257, but rather a judgment of a Texas Court of Appeals, merely an interim appellate court. The Texas Supreme Court refused to hear the case in question; therefore, §1257 may not be used to invoke the Supreme Court's jurisdiction. Petitioners seek review of a decision from an appeals court, not the highest court of Texas, the Texas Supreme Court. Further, there are no claims of unconstitutionality of any state laws cited by the Petitioners. The Petitioners are merely complaining about local procedural rules of court. Such rules do not involve any Constitutional questions.

STATEMENT OF THE CASE

This case is moot. The original declaratory judgment lawsuit styled "State Farm Lloyds Company vs. Samuel D. Adamo and Tana Adamo" was filed by State Farm to obtain a judicial ruling regarding whether State Farm had a duty to defend the Adamos in a case filed by Joseph Marino against Samuel and Tana Adamo and others in the 11th Judicial District Court of Harris County, Texas. On December 17, 1991, the district court dismissed Marino's suit against the Adamos and the other defendants with prejudice to refiling same.

Marino's subsequent motion for new trial was denied by the court. Marino appealed. On November 25, 1992, the Tenth Court of Appeals affirmed the district court's dismissal of the litigation as to all the defendants. On December 30, 1992, the Tenth Court of Appeals denied

Marino's motion for rehearing. Marino applied for a writ of error to the Texas Supreme Court. By June, 1993, the Texas Supreme Court had denied Marino's writ of error: the Supreme Court's denial of the writ of error ended the underlying case. With no underlying case pending, there is nothing for any court to decide in a declaratory judgment action because there is no longer any "justiciable issue."

REASONS FOR DENYING THE WRIT

I.

DUE PROCESS DOES NOT INCLUDE THE RIGHT TO ORAL ARGUMENT ON A MOTION.

The Petitioners incorrectly assume that due process requires an oral hearing on a motion for summary judgment, and then attempt to "boot strap" a discretionary, local court rule into a federal question. Due process does not include the right to oral argument on a motion. *Spark v. Catholic University of America*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (per curium); see also, *Morrow v. Topping*, 437 F.2d 1155 (9th Cir. 1971). Under Texas law, the decision whether to grant an oral hearing on a motion is purely within the discretion of the trial judge. Oral argument is not always necessary or desirable in summary judgment proceedings because no new evidence may be received, and oral testimony may not be considered. *Richards v. Allen*, 402 S.W.2d 158, 160 (Tex. 1966). Further, the Fifth Circuit Court of Appeals has held that the "hearing" referred to in Fed. Rule Civ. Pro. 56 does *not* necessarily mean an oral hearing. *Kibort v. Hampton*, 538 F.2d 90, 91

(5th Cir. 1976). What Rule 56 contemplates is providing the adverse party with an opportunity to prepare and submit a response, affidavits, memoranda, and other materials for the court to consider when ruling on the summary judgment motion. *Id.*, at 91. The Harris County District Court Local Rule 3.3, giving the trial court the sole discretion whether to grant an oral hearing, does not run contrary to several federal courts' local rules or the U.S. Constitution. The Petitioners' writ should be denied.

CONCLUSION

In this declaratory judgment action, the underlying case has been dismissed; therefore, there is no justiciable controversy before the court relative to this case. The Harris County Local Rule does not violate due process, and due process does not include the right to oral argument on a motion. Respondent respectfully requests that this court deny the Petitioners' writ of certiorari to review the judgment and opinion of the Texas Fourteenth Court of Appeals, Houston, Texas.

Respectfully submitted,

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